

**FISH AND GAME COMMISSION
STATEMENT OF PROPOSED EMERGENCY
REGULATORY ACTION**

Emergency Action to Add Section 749.2, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Xantus's Murrelet
(*Synthliboramphus hypoleucus*) During Candidacy Period

I. Statement of Facts Constituting Need for Emergency Regulatory Action:

The Fish and Game Commission (Commission) is the decision-making body that implements the California Endangered Species Act (CESA). As described in greater detail below, CESA authorizes the Commission to establish lists of threatened and endangered species, and to add or remove species from the lists if it finds, upon receipt of sufficient scientific information, that the action is warranted. Pursuant to Section 2084 of the Fish and Game Code (FGC), the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and Game (Department) and Commission evaluate whether the species should be listed as threatened or endangered under CESA. The Commission has relied on the authority in Section 2084 to permit take of candidate species on four previous occasions: in 1994 for the southern torrent salamander, in 1994 for the coho salmon south of San Francisco, in 1997 and 1998 for the spring-run chinook salmon and in 2000 for coho salmon throughout its range in California.

On April 16, 2002, the Commission received a petition from the Pacific Seabird Group to list Xantus's murrelet as a threatened species under CESA. The Pacific Seabird Group is a society of professional seabird researchers and managers dedicated to the study and conservation of seabirds. The petition describes: 1) the small U.S. and world population; 2) its geographically restricted breeding range; 3) declines at the largest U.S. colony at Santa Barbara Island; and 4) abundant and increasing major threats to murrelets.

The Commission referred the petition to the Department on April 25, 2002 for a 90-day review period, as required by Section 2073, FGC. The Department requested and received a 30-day extension of the review period as allowed by Section 2073.5 (b), FGC. The Department determined on August 22, 2002 that there was sufficient information in the petition to indicate that the Xantus's murrelet's listing may be warranted and, based on that determination, recommended that the Commission accept the petition. As described in the evaluation report, the Department relied on information and data in its files to interpret information in

the petition.

The Commission scheduled consideration of the petition and the Department evaluation report for its October 2002 meeting. The Commission will formally accept the Department's report on this date, receive public testimony, and make a decision on whether the petition provides sufficient information to indicate that the petitioned action may be warranted. The petition identifies the following activities as factors in the decline of Xantus's murrelet: introduced mammals, oil pollution, native predators, and artificial light pollution. Other threats listed in the petition include human disturbance at colonies, oceanographic and prey changes, military operations, and bycatch in fisheries.

Sections 2080 and 2085, FGC, prohibit the take of candidate species, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to Section 2084, FGC, or (2) the Department authorizes the take through incidental take permits issued on a project-by-project basis. If the Commission designates Xantus's murrelet as a candidate species, individuals and entities engaged in any activity that may result in incidental take of Xantus's murrelet, including the activities listed above, are at risk of citation for unauthorized take. For example, operators of vessels that use bright lights that would attract and/or disorient murrelets such that death, injury, disruption of nesting activities and/or increased predation resulted may be subject to criminal prosecution for unlawful take under CESA. In the absence of these emergency regulations, individuals like those just described would need to obtain a permit from the Department in order avoid liability and potential criminal violations of CESA for actions or activities that result in take of the candidate species.

The issuance of individual permits authorizing incidental take is a complicated, lengthy, and expensive process, and the Commission specifically finds that it is not feasible for the Department to issue permits or consistency determinations on a project-by-project basis for the multitude of activities that will otherwise be prohibited during the Xantus's murrelet's candidacy period. The Department has testified that the species is not, in its opinion, at immediate risk of extinction. At the same time, these proposed regulations include conditions designed to protect Xantus's murrelet that apply to all covered activities. For these reasons, the emergency regulations are necessary to allow economic and recreational activities to continue within the area covered by the petition while ensuring appropriate interim protections for Xantus's murrelet while the Department conducts a 12-month review of the status of the candidate species subject to the petition.

The Department requests that the Commission adopt regulations through the

emergency regulatory process pursuant to Section 2084, FGC. The emergency regulations will remain in effect during the time the Commission carries out the normal listing process under CESA.

II. Express Finding of Emergency

Pursuant to the authority vested in it by Section 240, FGC, and for the reasons set forth above in the “Statement of Facts Constituting Need for Emergency Regulatory Action,” the Commission expressly finds that adoption of these regulations is necessary for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of these regulations will allow activities that may affect Xantus’s murrelet to continue during the candidacy period as long as they are conducted in a manner consistent with the protections specified in these regulations.

III. Authority and Reference Citations

Authority: Sections 200, 202, 205, 240, and 2084, Fish and Game Code.

Reference: Section 200, 202, 205, 240 and 2084, Fish and Game Code.

Informative Digest

The sections below describe laws relating to listing species under CESA, the effect of these emergency regulations, a description of related federal law, and a policy statement overview.

A. Laws Related to the Emergency Regulations - Listing under CESA

1. Petition and Acceptance

Section 2070, FGC, requires the Commission to establish a list of endangered species and a list of threatened species. Any interested person may petition the Commission to add a species to the endangered or threatened list by following the requirements in Fish and Game Code Sections 2072 and 2072.3. If a petition is not factually incomplete and is on the appropriate form, it is forwarded to the Department for evaluation.

Section 2073.5, FGC, sets out the process for accepting or rejecting a petition to list a species, and if the petition is accepted, a process for actually determining whether listing of the species as threatened or endangered is ultimately warranted. The first step toward petition acceptance involves a 90-day review of

the petition by the Department to determine whether the petition contains sufficient information to indicate that the petitioned action may be warranted. The Department prepares a report to the Commission that recommends rejection or acceptance of the petition based on its evaluation.

Section 2074.2, FGC, provides that, if the Commission finds that the petition provides sufficient information to indicate that the petitioned action may be warranted, the petition is accepted for consideration and the species that is the subject of the petition becomes a "candidate species" under CESA. CESA prohibits unauthorized take of a candidate species, just as it prohibits such take of threatened and endangered species, from the time the Commission notifies interested parties and the general public of its acceptance of the petition. "Take" means "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill. "Killing of a candidate, threatened, or endangered species under CESA that is incidental to an otherwise lawful activity and not the primary purpose of the activity constitutes a take under state law. (*Department of Fish and Game v. Anderson-Cottonwood Irrigation District* (1992) 8 Cal.App.4th 1554.)

Once a petition is accepted by the Commission, all activities, whether new or ongoing, that cause incidental take of the candidate species are in violation of the prohibition on unauthorized take of listed or candidate species found in Section 2080, FGC, unless the take is authorized in regulations adopted by the Commission pursuant to Section 2084, FGC, or unless the Department authorizes the take through the issuance of an incidental take permit under Section 2081, FGC, or other means authorized by CESA.

2. Status Review Final Action on the Petition

The Commission's acceptance of a petition initiates a 12-month review by the Department, pursuant to Section 2074.6, FGC, of the species' status to determine whether the species should be listed as threatened or endangered. Unlike the Department's initial evaluation, which focuses largely on the sufficiency of information submitted in the petition, the 12-month status review involves a broader inquiry into and evaluation of available information from other sources. The Commission is required to solicit data and comments on the proposed listing soon after the petition is accepted, and the Department's written status report must be based upon the best scientific information available.

Within 12 months of the petition's acceptance, the Department must provide the Commission a written report that indicates whether the petitioned action is warranted (Section 2074, FGC). The Commission must schedule the petition for

final consideration at its next available meeting after receiving the Department's report (Section 2075, FGC). In its final action on the petition, the Commission is required to decide whether listing the species as threatened or endangered "is warranted" or "is not warranted"; if listing is not warranted in the Commission's judgment, the species loses its protection under CESA (Section 2075.5, FGC).

B. Effect of the Emergency Regulations

The proposed emergency regulations authorize and provide for take of Xantus's murrelet during its candidacy under CESA as follows:

1. During the candidacy period incidental take of Xantus's murrelet resulting from night-time (dusk to dawn) operation of a vessel is authorized prior to February 1 and after July 15 and is authorized at any time outside of the areas from the mean high tide line extending 1 nm around the entire shoreline of Santa Barbara and Anacapa islands.
2. Incidental take of Xantus's murrelet resulting from night-time operation of a vessel from February 1 to July 15 within the areas from mean high tide to 1 nm around the entire shoreline of Santa Barbara and Anacapa islands is authorized only where such take occurs in compliance with each of the following restrictions:

Vessels are not engaged in night fishing or night diving;

External loud speakers on the vessels are not in use;

Vessels are within a designated anchorage or safe harbor during the night, except when transiting through the areas specified in the regulations; and

Lighting on the vessels is limited to navigational lighting necessary for safe operations.

3. Take of Xantus's murrelet in the course of ongoing research and monitoring of this species by public agencies other than the Department and by private parties is authorized provided that, for such ongoing research, a written, detailed project progress report is provided to the Department.

C. Existing, Comparable Federal Regulations or Statutes

The federal Endangered Species Act (16 U.S.C. Section 1531 et seq.) includes a listing process that is comparable to the listing process under CESA. The Pacific Seabird Group submitted a petition to list the Xantus's murrelets under the federal Endangered Species Act to the U.S. Fish and Wildlife Service (FWS) at

the same time it submitted the petition to the Department. The FWS has not taken action on the petition.

Section 4(d) of the Endangered Species Act (ESA) is similar in some respects to Section 2084 of the Fish and Game Code (16 USC Section 1533 (d)). This section authorizes the National Marine Fisheries Service (NMFS) or the FWS to issue protective regulations prohibiting the take of species listed as threatened. These regulations may include any or all of the prohibitions that apply to protect endangered species and may include exceptions to those prohibitions. Section 4(d) rules give the NMFS and the FWS the ability to craft comprehensive regulations to apply to particular activities that may result in a take of a threatened species, in a manner similar to the Commission's authority to prescribe terms and conditions pursuant to Section 2084 during the species candidacy period.

Similarly, the Migratory Bird Treaty Act provides for protection of migratory birds with a definition of "take" which includes all portions of the FGC Section 86 definition of "take". In addition, the Act provides for the Secretary of the Interior to adopt regulations determining the extent to which "take" will be allowed.

D. Policy Statement Overview

The objective of these regulations is to allow a variety of activities to continue on an interim basis, subject to the measures in the proposed regulation designed to protect Xantus's murrelet. Approval and implementation of the proposed emergency regulation will allow the Department to focus its efforts on evaluation of the status of the species in the event the Commission accepts the petition. The Department's evaluation of the species during the candidacy period will result in a status report regarding the species, which will provide a basis for the Department's recommendation to the Commission regarding the species' appropriate long-term status under CESA.

V. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements for its emergency regulations found at Section 240, FGC. A public hearing on these regulations was held on October 23, 2002, and the above finding that these regulations are necessary for the immediate preservation of the general welfare meets the requirements of Section 240.

VI. Local Mandate Determination

The Commission has determined that the proposed emergency regulations do not impose a mandate on local agencies or school districts.

VII. Fiscal Impact

The Commission has determined that the proposed emergency regulations will not result in any cost to any local agency or school district for which Government Code sections 17500 through 17630 require reimbursement. The Commission has determined that the proposed emergency regulations will not result in the imposition upon local agencies of any other non-discretionary costs or savings. The Commission has determined that the proposed emergency regulations will not result in costs or savings in federal funding to the State. The Commission has determined that the proposed emergency regulations will not result in any costs or savings to the Commission or the Department.